IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC 83682
	)	
NATHAN HAWKINS,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF MONROE COUNTY, MISSOURI
10TH JUDICIAL CIRCUIT, DIVISION 1
THE HONORABLE GLENN A. NORTON, JUDGE

APPELLANT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Nathan Hawkins, Appellant, was convicted, after a jury trial in Monroe County, of murder in the first degree, §565.020 RSMo 1994[1]. Prior to trial the state waived the death penalty, and therefore Appellant was sentenced to life imprisonment without the possibility of probation or parole. This Court granted transfer pursuant to Rule 83.04 and therefore jurisdiction lies in this Court, Article V, § 10, Mo. Const. (as amended 1976).

[1]All further references will be to RSMo 1994 unless otherwise indicated.

STATEMENT OF FACTS

Donald "Uncle Mo" Smith lived next door to Appellant, Nathan Hawkins in a Dover St. trailer in Monroe City, Missouri (Tr. 160-161). On November 9, 1998, Eric Cooper asked Uncle Mo if he could spend the night at his trailer and Uncle Mo agreed (Tr. 165). Cindy Dowell was with Hawkins at his trailer that night (Tr. 250). While there, Dowell saw a gun in Hawkins' bedroom (Tr. 251). That evening, Uncle Mo came to the trailer to borrow Dowell's car to drive to the store for a beer (Tr. 254).

It was rainy and cold that night (Tr. 172). Uncle Mo agreed to buy Hawkins a beer and told Hawkins and Dowell to come over to his trailer later to retrieve the car keys and get the beer (Tr. 254). They agreed since Dowell wanted to see Uncle Mo's girlfriend Lori McBride, who had miscarried a day or so before (Tr. 255).

After Uncle Mo left, Jermaine Mayfield arrived at Hawkins' trailer (Tr. 253) and he joined Hawkins and Dowell on their visit to Uncle Mo's trailer (Tr. 254). When they arrived, they saw Eric Cooper (Tr. 255). Cooper and Hawkins had had trouble in the past (Tr. 256).

After some loud discussion (Tr. 169, 237), Uncle Mo decided to take Cooper home because they had started talking about something that had happened a year ago and it seemed like it "could have been a controversy" (Tr. 169). Based on the discussions that were going on between Cooper and Hawkins, Uncle Mo feared that "it could possibly turn into something more than what [he] wanted in

the trailer" (Tr. 191). According to Uncle Mo, it was Dowell who was instigating the trouble, continually "picking at" Cooper (Tr. 192). Before they left, Uncle Mo pulled Cooper to the back of the trailer (Tr. 258). When they came back into the living room, Uncle Mo asked to borrow Dowell's car to take Cooper home to prevent further fighting (Tr. 259). Uncle Mo and Cooper left the trailer and got into Dowell's car, with Cooper getting into the front passenger seat (Tr. 172). Uncle Mo heard the doors shut, and the next thing he heard was a "boom" (Tr. 173). He got out of the car, went around and saw Cooper with his feet in the car but his head on the ground (Tr. 173). Uncle Mo saw Hawkins standing on the porch with a gun in his hand, "like he was in shock" (Tr. 174). Uncle Mo approached and tried to get the gun from Hawkins, but Hawkins wouldn't let him have it (Tr. 175). At that point, Mayfield came out of the trailer, grabbed Hawkins, pushed him off the porch, and they ran up the street (Tr. 176). Uncle Mo ran across the street and had the neighbor call 911 (Tr. 177). The neighbor's boyfriend, a fireman, pulled Cooper out of the car, laid him flat on the ground, and began working on him (Tr. 181).

After several days in the hospital, Cooper died as the result of a gunshot wound to the head (Tr. 219). The wound was located four inches above, and ½ inch behind his right ear canal (Tr. 213). The State was permitted to use an autopsy photograph (State's Exhibit #4) which showed the victim's head after surgery (Tr. 215). While the trial court agreed that it was "a gory picture", defense counsel's objections and request to voir dire the witness as to whether a model

head would serve the same purpose as the photograph were denied, and the photograph was admitted (Tr. 216-217).

Hawkins showed up at Marshal White's home in Shelbina at about 1:00 a.m. on November 10th (Tr.Vol.2-8, 10). He was upset and shaking and told her he had shot someone (Tr.Vol.2-11). He told her that the man he'd shot was from Kansas City and that he had threatened him (Tr.Vol.2-11). White admitted that her written statement to police did not include any mention of the threats (Tr.Vol.2-16). She testified that she had told the police that Hawkins said that but did not realize it was not in her written statement (Tr.Vol.2-17).

Monroe City Police Officer Rick Stone was called to the scene at around 12:15 a.m. (Tr. 298). Over objection, Stone was permitted to testify to the search of Hawkins' trailer (Tr. 306, L.F. 10-14).[2] The police seized two spent 9 mm shell casings from Hawkins" trailer (Tr. 308). Although Stone did not thoroughly search Dowell's car that night, he did note that the passenger door was open and the passenger window was intact Tr. 310).

Mike Platte, a sergeant with the Missouri State Highway Patrol, was called in to assist in the investigation (Tr. 312). He was permitted to testify, over objection, that during the search of Hawkins' trailer, police found a sonogram

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[2]To avoid redundancy, additional facts necessary for a discussion of the trial court's error in overruling the motions to suppress will be set forth in the argument section of the brief under Point Relied On and Argument II.

which lead them to Marshal White's home in Shelbina (Tr. 326). Hawkins was found hiding in White's home (Tr. 332) and was arrested (Tr. 333). Platte also testified, again over objection, that Hawkins agreed to talk with him and told him that he had seen Cooper leaning down in the car, that he did not know whether he was reaching for a weapon, and he then shot him and ran (Tr. 336). Hawkins told Platte that he must have lost the gun while he was running (Tr. 336). Hawkins was then taken to the station where he again agreed to talk to Platte (Tr. 337). According to Platte, Hawkins told him that the gun had been left at the northwest corner of his trailer and that he had to retrieve it before shooting Cooper (Tr. 337). Hawkins also gave a written statement which was, again over objection, read to the jury (Tr. 342). In it, Hawkins stated that:

> I, Nathan Hawkins, was at 414 East Dover or E. Dover at approximately 11:30 when an argument broke out with Eric. After a while, he decided to go home. They went outside. Then shortly after, I was on my way home. When I walked outside, I saw Eric in Cindy's car. Legs were out and he was hunched over inside. I thought he was reaching for a weapon or something. That's when I fired one shot and fled on foot to my sister's. And after getting there, had her take me to Shelbina. I stayed at my girlfriend's house until about 11:30 a.m. when officers searched the house and found me under the bed.

(Tr. 343).

On cross examination, Platte conceded that his testimony about Hawkins retrieving the gun was new (Tr. 346), and the State stipulated that in previous court appearances, when asked about what Hawkins had told him, Platte had not given the answer that Hawkins had said he retrieved the gun from the northwest corner of his trailer (Tr. 348). Platte did not tape record his questions or Hawkins' answers (Tr. 363), and he had destroyed his notes (Tr. 364). The State was permitted, over objection, to introduce State's Exhibits 9, 10, 11, 12 and 14, photographs of Dowell's car after it had been removed from the scene, showing blood spatters and brain matter (Tr. 317-323).

Dowell testified that when she went to recover her automobile, there was a 13-14" knife sitting on the back seat (Tr. 275). The knife was not hers. She took photographs of the knife and then turned it over to Rick Stone (Tr. 276). Platte testified that he had searched Dowell's car on November 10th and the "closest thing to a weapon was a pair of scissors" (Tr. 343).

The defense then put on the following evidence.

Eric Cooper came to Monroe County from Kansas City, and often spoke of his gang affiliations (Tr.Vol.2 -30, 55, 126, 146, 188). Cooper and Hawkins had a fight during which Hawkins hit Cooper, who then ran away (Tr.Vol.2 - 57). After that, Cooper threatened to kill Hawkins (Tr.Vol.2 - 29, 57, 126, 146). On one occasion, Cooper pulled a gun on Hawkins and his cousin Chance Mayfield (Tr.Vol.2 - 58). The following day, Cooper had members of his gang at his father's trailer and they were displaying rifles and handguns (Tr.Vol.2 - 60).

Jermaine Dean testified that he was with Hawkins and Dowell when they went to Uncle Mo's trailer the night of the shooting (Tr.Vol.2 - 141). According to Dean, it was Dowell who started in on what had happened between Cooper and Hawkins the previous year and that Cooper and Hawkins then started having words (Tr.Vol.2 - 144). Cooper kept talking about going to Kansas City to get his "boys" to take care of Hawkins (Tr.Vol.2 - 146). When Uncle Mo and Hawkins left to get another beer, Cooper told Dean that he could take care of Hawkins personally (Tr.Vol.2 - 147). Dean told Hawkins what Cooper had said when he returned (Tr.Vol.2 - 148).

Cooper and Hawkins argued, and Uncle Mo told Cooper to calm down and then he decided to take him home (Tr.Vol.2 - 149). Uncle Mo and Cooper left the trailer (Tr.Vol.2 - 150). Two or three minutes later Hawkins got up and went to the door, said he'd be right back and left (Tr.Vol.2 - 152). Dean heard a shot and a "few minutes later", he went out and stepped onto the porch (Tr.Vol.2 - 154). He saw Cooper lying on the ground and Uncle Mo getting out of the car (Tr.Vol.2 - 154). He saw Hawkins running down the street and he began running too (Tr.Vol.2 - 155). On cross-examination, Dean testified that Cooper did not make any direct threats to Hawkins (Tr.Vol.2 - 169).

Hawkins testified in his own defense. He had been living at the trailer next door to Uncle Mo for about four months in November, 1998 (Tr.Vol.2 - 194). About the second week he lived there he found a gun at the northwest corner of the trailer, outside (Tr.Vol.2 - 196). He told Platte that that was where he

normally kept the gun unless it was raining when he would bring it inside (Tr.Vol.2 - 198). It was raining on the night of the shooting and Hawkins had the gun inside (Tr.Vol.2 - 199). He knew Cooper was at Uncle Mo's before he went there and he knew that Cooper had threatened him in the past so he took the gun with him (Tr.Vol.2 - 203). He was hoping to resolve his differences with Cooper (Tr.Vol.2 - 205).

When Hawkins and Uncle Mo got back from a trip to the store, Dean told him that Cooper had said that he was going to take care of Hawkins himself that night (Tr.Vol.2 - 212). In addition, Cooper was making hand gestures indicating that he was going to kill him (Tr.Vol.2 - 212). Uncle Mo told Cooper to calm down and the discussion became loud enough so that Lori McBride, who had been in the back bedroom, came out and told them to quiet down (Tr.Vol.2 - 213). Uncle Mo and Cooper then went into the back of the trailer and when they came back into the living room, Uncle Mo asked Cooper if he was ready to go (Tr.Vol.2 - 214). Even as they were leaving, Cooper was making hand signals toward Hawkins (Tr.Vol.2 - 215). Hawkins wanted to go home where he would feel safe and so he gave Uncle Mo and Cooper enough time to be gone before he left the trailer (Tr.Vol.2 - 218-219). When he stepped onto the porch he saw that the car was still there (Tr.Vol.2 - 222). After his run-in with Cooper, a lot of people had told him that Cooper was threatening to kill him (Tr.Vol.2 - 233). He had been with Chance Mayfield the day Cooper pointed a gun at them (Tr.Vol.2 - 237). He was familiar with Cooper's reputation for violence and he knew that Cooper had

fought with police officers (Tr.Vol.2 - 240-241). The gun was in his back pocket (Tr.Vol.2 - 248). Cooper began making gang signs again and mouthing "I'm going to kill you". The car door opened, Cooper "hunched over" and began moving "like he was reaching over to grab something" all the while looking over at Hawkins and then looking inside the car (Tr.Vol.2 - 250-251).

Hawkins testified that he shot Cooper because,

> I was scared, I thought he was reaching for something to kill me. He just told me that time he was going to kill me. He told me the year before the next time he saw me he was going to kill me, all the threats he gave me, I thought he was doing something.

(Tr.Vol.2 - 255). On cross examination, the prosecuting attorney was permitted, over objection, to introduce and read to the jury, two notes taken from the front of Hawkins' refrigerator during the search. The notes contained lyrics to rap songs (Tr.Vol.2 - 292-293).

Hawkins' motion for judgment of acquittal at the end of all of the evidence was overruled (Tr.Vol.2 - 322). The jury was instructed on murder in the first degree (Instruction No. 5, L.F. 62) and murder in the second degree (Instruction No. 6, L.F. 63). The jury was also given an instruction on self-defense (Instruction No. 10, L.F. 67-68).

There was no cross reference in Instructions Nos. 5 and 6 to Instruction No. 10. In addition, Instruction No. 6 included a paragraph concerning sudden passion

although no instruction on voluntary manslaughter was requested or given by the court on its own motion (L.F. 57-72).

During its deliberations, the jury sent a question concerning Instruction No. 6, asking the court whether the language "did not do so [under the influence of sudden passion arising from adequate cause] was the "correct verbiage describing second degree murder?" (Tr.Vol.2 - 369, Supp.L.F. 1). The jury had underlined the words "did not do so" (L.F. 63) and asked, "[d]oes the word 'not' underlined belong in this statement? (Tr.Vol.2 - 369). The trial court responded that the jury "must be guided by the instructions previously given to you by the Court" (Tr.Vol.2 - 370).

The jury returned its verdicts, finding Hawkins guilty of murder in the first degree and armed criminal action (L.F. 73, 74).

The trial court overruled Hawkins' motion for new trial (Tr.Vol.3 - 27) and, following the jury's recommendations, sentenced Hawkins to life without possibility of probation and parole and life imprisonment, consecutive (Tr.Vol.3 - 30). Hawkins filed a timely notice of appeal (L.F. 81).

POINTS RELIED ON

I

The trial court plainly erred in giving Instructions No. 5 and 6, the verdict directors for murder in the first degree and murder in the second degree because those instructions were not in conformity with MAI-CR3d 304.02, 313.02, 313.04 and 306.06 and thereby deprived Hawkins of due process, a properly instructed jury and a fair trial, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, §§ 10 and 18(a) of the Missouri Constitution as well as Rule 28.02 in that the verdict directors failed to cross reference Hawkins' self-defense instruction and Hawkins was prejudiced because the verdict directors purported to cover the whole case and yet ignored Hawkins' defense.

State v. Cook, 727 S.W.2d 413 (Mo. App. W.D. 1987);

State v. McClure, 632 S.W.2d 314 (Mo. App., S.D. 1982);

State v. Fox, 510 S.W.2d 832 (Mo. App., St.L.D. 1974);

State v. Cline, 808 S.W.2d 822 (Mo. banc 1991);

U.S. Const., Amends. V, VI and XIV;

Mo. Const., Art. I, §§ 10 and 18(a);

Rules 28.02 and 30.20; and

MAI-CR3ds 304.02, 313.02, and 313.04.

II

The trial court plainly erred in giving Instruction No. 6, the verdict director for murder in the second degree because that instruction was not in conformity with MAI-CR3d 313.04 and 304.11 and thereby deprived Hawkins of due process, a properly instructed jury and a fair trial, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution as well as Rule 28.02 in that the verdict director for murder in the second degree included a third paragraph requiring the jury to find that Hawkins had not acted under the influence of sudden passion arising from adequate cause even though no voluntary manslaughter instruction was given. Hawkins was prejudiced because the jury was confused by the inclusion of the requirement that it find that he had not acted under the influence of sudden passion in light of the closing arguments in which both attorneys misstated the law by indicating that murder in the second degree required a finding that the shooting was a spontaneous, "hot blooded" act thereby confusing voluntary manslaughter with murder in the second degree.

State v. Beeler, 12 S.W.3d 294 (Mo. banc 2000);

State v. Ludwig, 18 S.W.3d 139 (Mo.App., E.D. 2000)'

State v. Ottwell, 852 S.W.2d 370 (Mo.App., E.D. 1993);

State v. Merchant, 791 S.W.2d 840 (Mo.App., W.D. 1990);

U.S. Const., Amends. V, VI and XIV;

Mo. Const., Article. I, §§ 10 and 18(a);

Rules 28.02 and 30.20;

MAI-CR3d 313.04 and 3.04.02.

III

The trial court erred in overruling Hawkins' objection and in permitting the prosecuting attorney to introduce and read State's Exhibits 28 and 29, rap lyrics which were found during the search of Hawkins' trailer because that ruling violated Hawkins' rights to due process and a fair trial, as guaranteed by the 5th, 6th, and 14th amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution, in that the rap lyrics had no probative value as rebuttal to Hawkins' testimony that he was more of a lover than a fighter and this evidence did not make Hawkin's guilt more or less likely. Hawkins was prejudiceddue to the profane and vilent content of the lyrics which may have caused the jury to convict him because he was a "bad" person rather than because they believed him guilty of murder in the first degree.

State v. Hanson, 731 P.2d 1140 (Wash. App. 1987);

United States v. Giese, 597 F.2d 1170 (9th Cir.), *cert. denied* 444 U.S. 979 (1979);

State v. Brown, 718 S.W.2d 493 (Mo.banc 1986);

State v. Earvin, 510 S.W.2d 419 (Mo. 1974);

U.S. Const., Amends. V, VI and XIV;

Mo. Const., Article I, §§ 10 and 18(a).

IV

The trial court erred in overruling Hawkins' motion to suppress evidence and his statements and in overruling objections during trial and allowing testimony that 9 mm shell casings and rap lyrics had been found in his trailer during the search and in permitting Sgt. Platte to testify to statements made by Hawkins in that those rulings denied Hawkins his rights to be free from unreasonable searches and seizures, against compelled self-incrimination, to due process and a fair trial as guaranteed by the 4th, 5th, 6th and 14th Amendments to the United States Constitution and Article I, §§ 10, 15 18(a) and 19 of the Missouri Constitution as well as § 542.276 and Missouri case law because the affidavit used to obtain the search warrant for Hawkins' trailer was based on third hand hearsay the reliability of which was never established, the seizure of two notes containing rap lyrics was not authorized by the warrant, and Hawkins' statements were obtained as a direct result of the illegal search and therefore should have been suppressed as the fruit of the poisonous tree.

State v. Hammett, 784 S.W.2d 293 (Mo.App., E.D. 1989);

Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983);

State v. Gordon, 851 S.W.2d 607 (Mo.App., S.D. 1993);

State v. Johnston, 957 S.W.2d 734 (Mo. banc 1997);

U.S. Const., Amends. IV, V, VI and XIV;

Mo. Const., Art. I, §§ 10, 15, 18(a) and 19; and

§ 542.276.

ARGUMENT

I

The trial court plainly erred in giving Instructions No. 5 and 6, the verdict directors for murder in the first degree and murder in the second degree because those instructions were not in conformity with MAI-CR3d 304.11, 313.02, 313.04 and 306.06 and thereby deprived Hawkins of due process, a properly instructed jury and a fair trial, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, §§ 10 and 18(a) of the Missouri Constitution as well as Rule 28.02 in that the verdict directors failed to cross reference Hawkins' self-defense instruction and Hawkins was prejudiced because the verdict directors purported to cover the whole case and yet ignored Hawkins' defense.

Hawkins' jury was given two verdict directing instructions, murder in the first degree and murder in the second degree (L.F. 62-63). The jury was also given an instruction on the defense of self-defense (L.F. 67-68). It appears that no voluntary manslaughter instruction was offered by either party, and the trial court did not give a verdict direction instruction of that offense on its own motion (L.F. 57-72).

The verdict directing instructions read as follows:

INSTRUCTION NO. 5

As to Count I, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or about November 10, 1998, in the County of Monroe, State of Missouri, the defendant caused the death of Eric Cooper by shooting him with a handgun, and

Second, that defendant knew that his conduct was practically certain to cause the death of Eric Cooper, and

Third, that defendant did so after deliberation, which means cool reflection upon the matter for any length of time no matter how brief,

then you will find the defendant guilty under Count I of murder in the first degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of murder in the first degree.

If you do find the defendant guilty under Count I of murder in the first degree, you are to assess and declare the punishment at imprisonment for life without eligibility for probation or parole.

(L.F. 62).

INSTRUCTION NO. 6

As to Count I, if you do not find the defendant guilty of murder in the first degree, you must consider whether he is guilty of murder in the second degree.

As to Count I, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or about November 10, 1998, in the County of Monroe, State of Missouri, the defendant cause the death of Eric Cooper by shooting him with a handgun, and

Second, that defendant knew that his conduct was practically certain to cause the death of Eric Cooper, and

Third, that defendant did not do so under the influence of sudden passion arising from adequate cause,

then you will find the defendant guilty under Count I of murder in the second degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant

not guilty of murder in the second degree.

As used in this instruction, the term "sudden passion" means passion directly caused by and arising out of provocation by Eric Cooper which passion arose at the time of the offense and was not solely the result of former provocation. The term "adequate cause" means cause that would reasonably produce a degree of passion in a person of ordinary temperament sufficient to impair an ordinary person's capacity for self-control.

If you do find the defendant guilty under Count I of murder

in the second degree, you will assess and declare one of the following punishments:

1. Life Imprisonment
2. Imprisonment for a term of years fixed by you, but not less ten years and not to exceed thirty years.

(L.F. 63).

Hawkins' self-defense instruction read as follow:

INSTRUCTION NO. 10

PART A

One of the issues in this case is whether the use of force by the defendant against Eric Cooper was in self-defense. In this state, the use of force including the use of deadly force to protect oneself from harm is lawful in certain situations.

In order for a person lawfully to use force in self-defense, he must reasonably believe he is in imminent danger of harm from the other person. He need not be in actual danger but he must have a reasonable belief that he is in such danger.

If he has such a belief, he is then permitted to use that amount of force that he reasonably believes to be necessary to protect himself.

But a person is not permitted to use deadly force, that is, force that he knows will create a substantial risk of causing death or serious physical injury, unless he reasonably believes he is in imminent danger of death or serious physical injury.

And even then, a person may use deadly force only if he reasonably believes the use of such force is necessary to protect himself.

As used in this instruction, the term "reasonable belief" means a belief based on reasonable grounds, that is, grounds which could lead a reasonable person in the same situation to the same belief. This depends upon how the facts reasonably appeared. It does not depend upon whether the belief turned out to be true or false.

PART B

On the issue of self-defense in this case, you are instructed as follows:

If the defendant reasonably believed he was in imminent danger of death from the acts of Eric Cooper and he reasonably believed that the use of deadly force was necessary to defend himself, then he acted in lawful self-defense.

The State has the burden of proving beyond a reasonable doubt that the defendant did not act in lawful self-defense. Unless you find beyond a reasonable doubt that the defendant did not act in lawful self-defense, you must find the defendant not guilty.

As used in this instruction, the term "serious physical injury" means physical injury that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment.

PART C

Evidence has been introduced that Eric Cooper had a reputation for being violent and turbulent, and that the defendant was aware of that reputation. You

may consider this evidence in determining whether the defendant reasonably believed he was in imminent danger of harm from Eric Cooper.

Evidence has been introduced of the prior relationship between defendant and Eric Cooper, including evidence of arguments and acts of violence. You may consider this evidence in determining who was the initial aggressor in the encounter and you may also consider it in determining whether the defendant reasonably believed he was in imminent danger of harm from Eric Cooper.

Evidence has been introduced of acts of violence not involving the defendant committed by Eric Cooper and that the defendant was aware of these acts. You may consider this evidence in determining whether the defendant reasonably believed he was in imminent danger of harm from Eric Cooper. You may not consider this evidence in determining who was the initial aggressor in the encounter or for any other reason.

Evidence has been introduced of threats made by Eric Cooper against defendant. You may consider this evidence in determining who was the initial aggressor in the encounter.

If any threats against defendant were made by Eric Cooper and were known by or had been communicated to the defendant, you may consider this evidence in determining whether the defendant reasonably believed he was in imminent danger of harm from Eric Cooper.

You, however, should consider all of the evidence in the case in determining whether the defendant acted in lawful self-defense.

(L.F. 67-68).

STANDARD OF REVIEW

Trial counsel did not object to Instructions No. 5 or 6 on the grounds argued here, nor did he include these claims of error in the motion for new trial. Therefore, Hawkins is forced to ask this Court for plain error review.

Plain error review is discretionary, Rule 30.20, and granted where a claim of plain error "facially establishes substantial grounds for believing that 'manifest injustice or miscarriage of justice has resulted.'" *State v. Brown*, 902 S.W.2d 278, 284 (Mo. banc), *cert. denied* 516 U.S. 1031 (1995). Plain error review is permitted even where counsel fails to object to the instructions pursuant to rule 28.03. State v. Wurtzberger, 40 S.W.3d 893 (Mo.banc 2001). "For instructional error to rise to the level of plain error, the trial court must have so misdirected or failed to instruct the jury as to cause manifest injustice or miscarriage of justice." *State v. Parkus*, 753 S.W.2d 881, 888 (Mo. banc), *cert. denied* 488 U.S. 900 (1988).

Neither of these verdict directing instructions included a cross-reference to the special negative defense of self defense as given in Instruction No. 10 (L.F. 67-68). Note on Use 2 for MAI-CR3d 306.06; Note on Use 11 for MAI-CR3d 304.02; and the Charts found in MAI-CR3d 304 all require a cross-reference to each special negative defense on which a separate numbered instruction has been given. Rule 28.02(c) requires use of the Missouri Approved Criminal Instructions, and part (e) provides that the failure to follow applicable instructions or the Notes on Use constitutes error, the prejudicial effect to be judicially determined. *State v.*

Cook, 727 S.W.2d 413 (Mo. App. W.D. 1987). Such error is deemed prejudicial unless the contrary clearly appears. *State v. McClure*, 632 S.W.2d 314, 317 (Mo. App., S.D. 1982).

The error alleged in this case, i.e., the failure to include a cross-reference to a special negative defense in a verdict director has been found to be reversible error. *State v. Cook, supra; State v. Foster,* 631 S.W.2d 672, 675 (Mo. App., E.D. 1982); *State v. McClure, supra.* "A verdict directing instruction which purports to cover the whole case and ignores a defense supported by the evidence constitutes reversible error and the error is not cured by a separate instruction covering the defense." *McClure, supra* at 317, quoting *State v. Fox*, 510 S.W.2d 832, 868-837 (Mo. App., St.L.D. 1974). Thus, had this error been preserved for review, a new trial would be in order. Hawkins submits that this error also rises to the level of plain error. "The determination of whether plain error exists must be based on a consideration of the facts and circumstances of each case. *State v. Cline,* 808 S.W.2d 822, 824 (Mo. banc 1991).

Appellant is aware that in *State v. Dunlap,* 706 S.W.2d 272 (Mo.App.,E.D. 1986) and *State v. Cooksey*, 805 S.W.2d 709 (Mo.App., W.D. 1991) the courts found that a failure to cross-reference an affirmative defense did not rise to the level of plain error. Both of these cases are distinguishable from Hawkins' case. In *Dunlap,* the Court noted that the affirmative defense instruction cross-referenced the verdict director. *Dunlap*, 706 S.W.2d at 277L Thus, in *Dunlap,* the

jury realized that the verdict directors and the affirmative defense were linked. Here, Instruction 10 made no reference to Instructions 5 or 6.

In *Cooksey,* there was not the kind of instructional error found in Mr. Hawkins' case. Here, neither verdict director followed MAI-CR3d. Even if this Court looks to the closing arguments of counsel the error is not mitigated. While both attorneys discussed Instruction 10 in closing, nowhere did they tell the jury that they must consider Instruction 10 in conjunction with Instructions 5 and 6. They treated Instruction 10 as discrete, with no connection to the verdict directions. The situation here was that the jury could have found Mr. Hawkins guilty before they ever considered his defense of self-defense.

When this Court examines the facts and circumstances of this case, especially when this instructional error is taken together with the other error contained in Instruction No. 6, and the closing arguments of both counsel, Hawkins has clearly met his burden of showing more than "mere prejudice". The result of these instructions was to completely confuse the jury and preclude it from considering Hawkins' defense prior to making a finding of guilt or innocence. Hawkins has shown a manifest injustice, *State v. Howard,* 896 S.W.2d 471, 483 (Mo. App., S.D. 1995), and this Court should reverse his conviction and remand this case for a new trial.

II

The trial court plainly erred in giving Instruction No. 6, the verdict director for murder in the second degree because that instruction was not in conformity with MAI-CR3d 313.04 and 306.06 and thereby deprived Hawkins of due process, a properly instructed jury and a fair trial, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution as well as Rule 28.02 in that the verdict director for murder in the second degree included a third paragraph requiring the jury to find that Hawkins had not acted under the influence of sudden passion arising from adequate cause even though no voluntary manslaughter instruction was given. Hawkins was prejudiced because the jury was confused by the inclusion of the requirement that it find that he had not acted under the influence of sudden passion in light of the closing arguments in which both attorneys misstated the law by indicating that murder in the second degree required a finding that the shooting was a spontaneous, "hot blooded" act thereby confusing voluntary manslaughter with murder in the second degree.

Hawkins' jury was given two verdict directing instructions, murder in the first degree and murder in the second degree (L.F. 62-63). It appears that no voluntary manslaughter instruction was offered by either party, and the trial court

did not give a verdict directing instruction on that offense on its own motion (L.F. 57-72).

The verdict director for murder in the second degree read as follows:

INSTRUCTION NO. 6

As to Count I, if you do not find the defendant guilty of murder in the first degree, you must consider whether he is guilty of murder in the second degree.

As to Count I, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or about November 10, 1998, in the County of Monroe, State of Missouri, the defendant cause the death of Eric Cooper by shooting him with a handgun, and

Second, that defendant knew that his conduct was practically certain to cause the death of Eric Cooper, and

Third, that defendant did not do so under the influence of sudden passion arising from adequate cause,

then you will find the defendant guilty under Count I of murder in the second degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of murder in the second degree.

As used in this instruction, the term "sudden passion" means passion directly caused by and arising out of provocation by Eric Cooper which

passion arose at the time of the offense and was not solely the result of former provocation. The term "adequate cause" means cause that would reasonably produce a degree of passion in a person of ordinary temperament sufficient to impair an ordinary person's capacity for self-control.

If you do find the defendant guilty under Count I of murder in the second degree, you will assess and declare one of the following punishments:

1. Life Imprisonment
2. Imprisonment for a term of years fixed by you, but not less ten years and not to exceed thirty years.

(L.F. 63).

STANDARD OF REVIEW

Trial counsel did not object to Instruction No.6 on the grounds argued here, nor did he include this claim of error in the motion for new trial. Therefore, Hawkins is forced to ask this Court for plain error review.

Plain error review is discretionary, Rule 30.20, and granted where a claim of plain error "facially establishes substantial grounds for believing that 'manifest injustice or miscarriage of justice has resulted.'" *State v. Brown*, 902 S.W.2d 278, 284 (Mo. banc), *cert. denied* 516 U.S. 1031 (1995). Plain error review is permitted even where counsel fails to object to the instructions pursuant to rule 28.03. *State v. Wurtzberger*, 40 S.W.3d 893 (Mo.banc 2001). "Instructional error

constitutes plain error when it is clear the trial court so misdirected or failed to instruct the jury. . . that it is apparent the error affected the verdict." *State v. Beeler*, 12 S.W.2d 294, 300 (Mo. banc 2000).

As can be seen above, the verdict director for murder in the second degree submitted to the jury in Hawkins' case included optional paragraph (Third) of MAI-CR3d 313.04. That paragraph is to be used when there is evidence to support the mitigating factor of sudden passion arising from adequate cause and an instruction on voluntary manslaughter is given. Supplemental Notes on Use Applicable to 313.00 Series No. 4. See also, *State v. Ottwell*, 852 S.W.2d 370, 373 (Mo. App., E.D. 1993); *State v. Merchant*, 791 S.W.2d 840, 843 (Mo. App., W.D. 1990). No instruction on voluntary manslaughter was requested or given.

During its deliberations, the jury sent out a question concerning Instruction No. 6. They had also sent out the instruction with the optional third paragraph circled, and the words "did not do so" underlined (L.F. 63). The jury's question was, "[p]lease clarify, is the "did not do so [under the influence of sudden passion arising from adequate cause] the correct verbiage describing second degree murder? Does the word "not" underlined belong in this statement? (Tr.Vol.2 - 369). The trial court responded that the jury "must be guided by the instructions previously given to you by the Court" (Tr.Vol.2 - 370).

If this Court considers the closing arguments made by the attorneys in this case, the jury's confusion is understandable. In his opening argument, the prosecuting attorney stated that:

> Another possibility is laid out in Instruction No. 6, this is called second degree murder, and it says essentially you purposely kill somebody without deliberation. Often this is referred to as a hot-blooded act, a spontaneous act.

(Tr.Vol.2- 336). He continued with this theme when he told the jury:

> By choosing to go with a self-defense article (sic), he was telling you this wasn't a hot-blooded crime. He's telling you it wasn't just a spontaneous thing out of anger, and he could have told you that he made me so mad in that trailer that night I wanted to kill him. I just got so frustrated I pulled out that pistol in my pocket and killed him.
>
> And ladies and gentlemen, the State will admit that if he had killed Eric inside that Smith trailer we probably wouldn't be standing here. I wouldn't be here on behalf of the state arguing for a first degree murder, but that's not the way it was. It wasn't that hot of an argument. Nobody was in anybody's face. Nobody was fighting or fussing or showing weapons.

(Tr.Vol.2 - 340). Unfortunately, defense counsel picked up this theme and during his argument, informed the jury that:

> Now, second degree murder, Mr. Wilson has already told you that the second degree murder instruction is a -- how do you determine that is not a hot-blooded, that this is not a hot-blooded crime, but that it is a hot-blooded instruction. Or verdict form with respect to second degree murder.

Someone gets upset, sees their wife, whatever, sees their spouse, spouse, husband, spouse.

(Tr.Vol.2 - 344).

Even though Instruction No. 6 correctly states the elements of second degree murder and does correctly state the law that a defendant is guilty of murder in the second degree if he does not act under the influence of sudden passion, in the context of this case, the inclusion of optional paragraph (Third), clearly misled the jury and affected the verdict.

In *State v. Beeler*, this Court reversed the defendant's conviction of involuntary manslaughter because the instructions, though technically correct, created a situation where the jury could find that the defendant had acted "reasonably and unreasonably at the same time." 12 S.W.3d at 300. In reaching that decision, this Court made note of the fact that the instructional error "was compounded" by the prosecutor's closing argument. That is exactly what happened here.

The importance of looking at instructional error in the context of the case was reiterated by the Court in *State v. Ludwig*, 18 S.W.3d 139 (Mo.App., E.D. 2000). In *Ludwig*, the defendant had been convicted of involuntary manslaughter. The appellate court reversed, finding that the omission of the definition of "reckless" in the verdict director constituted plain error. *Id.* at 143. The Court distinguished *State v. Matheson*, 919 S.W.2d 553 (Mo.App., W.D. 1996), a case which had held that such an error did not reach the level of plain error, by noting

the factual context in which the error was made. Compare, *Ludwig,* 18 S.W.3d at 143, *Matheson,* 919 S.W.2d at 559.

In Hawkins' case the jury had been informed by the attorneys in closing that the difference between murder in the first degree and murder in the second degree was that one was a "cold-blooded" killing while the other was a "hot-blooded" killing. But it was given an instruction which provided that it could **not** find Hawkins guilty of murder in the second degree if he acted under the influence of sudden passion. The jury had clearly been considering that lesser offense as evidenced by its question to the court. It was also clearly confused because it would be reasonable for it to assume, based on the closing arguments, that acting under the influence of sudden passion was what mitigated murder in the first degree to murder in the second degree. Since the words “sudden passion” had not been used anywhere, by anyone, prior to Instruction No. 6, the jury could well have believed that that was a more legally correct way of saying “hot-blooded”. The jury naturally concluded that the third paragraph should have read, “Third, that defendant **did** do so under the influence of sudden passion. . .” as their question to the court makes clear. However, once it was told to follow the instructions as given, murder in the second degree was removed and they went back to the greater offense.

Hawkins has met his burden of showing that his jury was so misdirected and confused as to amount to a manifest injustice and reversal of his convictions is required.

III

The trial court erred and abused its discretion in overruling Hawkins' objection and in permitting the prosecuting attorney to introduce and read State's Exhibits 28 and 29, rap lyrics found during the search of Hawkins' trailer because that ruling violated Hawkins' rights to due process and a fair trial, as guaranteed by the 5th, 6th, and 14th amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution, in that the rap lyrics had not probative value as rebuttal to Hawkins' testimony that he was more of a lover than a fighter and this evidence was prejudicial due to the profane and violent content of the lyrics which may have caused the jury to convict him because he was a "bad" person rather than because he was guilty of murder in the first degree.

On direct examination, Hawkins testified, inter alia, that when he went to Uncle Mo's trailer, he knew that Cooper was there (Tr.Vol.2 - 203). He also testified that he had hoped to resolve his problem with Cooper (Tr.Vol.2 - 204). On cross examination the prosecuting attorney informed the court that he intended to introduce two "letters" which were found on the refrigerator of Hawkins' trailer during the search. The prosecuting attorney argued that the "letters" represented "a certain violent attitude toward life" which would contradict Hawkins' testimony that he was "a peace-loving person" (Tr.Vol.2 - 290). Defense counsel objected on the basis of the motion to suppress, and also because the "letters" were handwritten rap lyrics on sticky notes which had been placed on the refrigerator

door to aid memorization, and as such, they were irrelevant and immaterial (Tr.Vol.2 - 290-292). Those objections were overruled and the prosecuting attorney was permitted to read the lyrics to the jury. On redirect, Hawkins testified that the lyrics were not authored by him, they were lyrics taken from various rap songs "put together" (Tr.Vol.2 - 296). Those lyrics contained obscene language and graphic descriptions of sex and violence (Tr.Vol.2 - 292-293).[3]

A defendant's reputation as a peaceable person is relevant in a murder trial. *See State v. Manning*, 682 S.W.2d 127, 130-31 (Mo.App.E.D. 1984). When a defendant takes the stand to testify in his own behalf, he is subject to contradiction and impeachment just like any other witness. *State v. Francis*, 997 S.W.2d 74, 78 (Mo.App., W.D.1999). In Missouri, the general rule is that evidence concerning the defendant's character may only be shown by testimony as to his reputation – not by specific acts or conduct. *State v. Brown*, 718 S.W.2d 493, 493 (Mo banc 1986).

Therefore, even if Mr. Hawkins did place his reputation as a peaceable person in issue by testifying that he did not like to resolve difficulties through fighting (Vol. 2 – 205) or that he was more of a lover than a fighter (Vol. 2 – 299), the State's use of the rap lyrics to rebut that evidence was error. In *State v. Earvin*, 510 S.W.2d 419 (Mo. 1974), the Court reversed the defendant's conviction for murder because the State had introduced evidence of a specific incident during which the defendant reacted violently after losing a game. The state argued that

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[3]State's Exhibits 28 and 29 have been provided to this Court for its review.

this evidence rebutted the defendant's evidence of his reputation for being a peaceable person. *Id.* at 421. In reversing, the Court held, "[t]he rebuttal testimony was not admissible to counter the defendant's evidence of his good reputation for peaceful behavior. The state could have countered defendant's evidence on this score by evidence of his bad reputation for peaceful behavior, but not by proof of specific acts of misbehavior." *Id*. at 422, citation omitted. In *State v. Kitson,* 817 S.W.2d 594 (Mo.App.,E.D. 1991), the Court reversed the defendant's conviction of sodomy because the State had elicited evidence that the defendant performed anal intercourse with his wife and had placed objects into her vagina. In reversing, the Court held that the uncharged misconduct doctrine is not limited to uncharged crimes, and the erroneous admission of prior misconduct not amounting to a crime could be reversible error. *Id.* at 597

In *State v. Hanson,* 731 P.2d 1140 (Wash.App., 1987), the Court was faced with a case remarkably similar to the one at bar. Hanson was convicted of first degree assault for shooting a clerk during a robbery. *Id.* Hanson testified on direct examination that he had never committed a crime, and that even though he had served in Viet Nam, he had never killed anyone. On cross examination the prosecuting attorney was permitted to question Hanson about fiction he had written, some of which contained incidents of violence. *Id.* at 1143. Unlike Missouri, under Washington law, if a defendant has placed his character in issue, he may be cross-examined as to specific acts unrelated to the crime charged so

long as the information sought is relevant with respect to the character trait in issue and its probative value outweighs the danger of unfair prejudice. *Id.* at 1144.

In reversing Hanson's conviction, the Court found that his writings were irrelevant to rebut his character for nonviolence. *Id.* The Court noted that "[a] writer of crime fiction, for example, can hardly be said to have displayed criminal propensities through works he or she has authored." *Id.* The Court went on to find that even if the State had been able to show the relevance of the writings, "any probative value would be overwhelmed by the danger of unfair prejudice." *Id.* In reaching its decision, the Court cited the case of *United States v. Giese*, 597 F.2d 1170 (9th Cir), *cert. denied* 444 U.S. 979, 100 S.Ct. 480, 62 L.Ed.2d 405 (1979) in which the prosecutor had cross-examined the defendant about a book he had read. When Giese took the stand, he had testified on direct about a number of books he had read, which showed his peaceable character. On cross, the prosecutor asked him about a more radical book and Giese admitted that he had read it. *Id.* at 1145. A divided court held that Giese had invited the cross-examination by testifying about books he had read as proof of his peaceable, law-abiding character. The *Hansen* Court then quoted from the dissent in *Giese*, "No inference of any kind can be drawn about a person's character from the kinds of books that he reads. We have no basis in human experience to assume that persons of 'good' character confine their reading matter to 'good' books, or that persons who read peaceful books are peaceful people, or that persons who read books involving violence are violent people". *Id., quoting Giese,* 597 F.2d at 1207 (Hufstedler, J., dissenting).

In this case, the rap lyrics, like the writings in *Hanson*, had no relevance to the issue of Hawkins' reputation as a peaceable person. The fact that an eighteen-year old young man had lyrics to rap songs in his trailer tells us nothing about his character. It would be safe to say that every teenager in America who listens to music owns some of questionable taste or moral value. Because these lyrics had no relevance to Hawkins' character, their introduction into evidence was error. But even if these lyrics had some remote probative value, that value is overwhelmed by their prejudicial effect.

The prejudicial effect of this sort of evidence is well recognized by Missouri courts. Evidence of collateral crimes "may result in a conviction founded upon crimes of which the defendant is not accused." *State v. Shaw,* 636 S.W.2d 667, 671 (Mo. banc), *cert. denied* 459 U.S. 928 (1982). Evidence of collateral crimes forces an accused "to defend any number of charges about which the indictment gives him no information." *State v. Atkinson,* 293 S.W.2d 941, 944 (Mo. 1956). It may lead the jury to convict the defendant simply because he is a "bad man" or "tempt the jury to find the defendant guilty of being a criminal rather than being guilty of the particular crime charged." *State v. Garrett,* 825 S.W.2d 954, 957 (Mo.App.,E.D. 1992). The finding of prejudice based on collateral evidence of other crimes or wrongdoing is not limited to situations where an actual crime or conviction has occurred. These "principles clearly cover any wrongdoing that could have been the subject of a criminal charge and probably cover other wrongful acts and conduct to the extent that [such acts or conduct

could convey] to the jury the type of prejudice that accompanies a disclosure that the defendant has engaged in criminal conduct." *State v. Sladek*, 835 S.W.2d 308, 313 n. 1 (Mo banc 1992); *State v. Williams*, 865 S.W.2d 794, 804 (Mo.App., E.D. 1993) ("Defendant is wrong in asserting that the acts of prior misconduct must amount to a crime."); *Kitson*, 817 S.W.2d at 598 (holding that evidence of other misconduct, even if non-criminal, is encompassed within this rule and is inadmissible if it tends to show bad character).

Hawkins was on trial for murder. He never denied that he shot the victim, but he argued that he did so in self-defense. The rap lyrics read to the jury contain images of violence and retribution against someone who stole the author's "riches". By suggesting that these lyrics are a reflection of Hawkins' character, the jury could well have misused this evidence to decide that it was more likely that Hawkins' was a violent young man who would think nothing of shooting another young man with little or no provocation. The prosecutor played on this suggestion in closing when he argued: "If again you believe these witnesses. He didn't act on his philosophy of life that was stuck to his refrigerator. Defendant did. He told you what he believes, what he thinks, how he feels. And then he acted on it. Right here in Exhibits 28 and 29." (Vol. 2 – 357).

Introduction of those lyrics was error. That error was prejudicial. This Court should reverse Hawkins conviction and remand for a new trial.

IV

The trial court erred in overruling Hawkins' motion to suppress evidence and his statements and in overruling objections during trial and allowing testimony that 9 mm shell casings and rap lyrics had been found in his trailer during the search and in permitting Sgt. Platte to testify to statements made by Hawkins in that those rulings denied Hawkins his rights to be free from unreasonable searches and seizures, against compelled self-incrimination, to due process and a fair trial as guaranteed by the 4th, 5th, 6th and 14th Amendments to the United States Constitution and Article I, §§ 10, 15, 18(a) and 19 of the Missouri Constitution as well as § 542.276 and Missouri case law because the affidavit used to obtain the search warrant for Hawkins' trailer was based on third hand hearsay and there was no basis for judging the veracity and basis of knowledge of the sources of the information, the seizure of two notes containing rap lyrics was not authorized by the warrant, and Hawkins' statements were obtained as a direct result of the illegal search and therefore should have been suppressed as the fruit of the poisonous tree.

Prior to trial, Hawkins filed Motions to Suppress Statements (L.F. 10-12), Evidence (L.F. 13-14) and Identification (L.F. 15). An evidentiary hearing was held on these motion on June 24, 1999, at which time Hawkins withdrew the

Motion to Suppress Identification (M.Tr.8)[4]. At that hearing it was established that Officer Rick Stone had been called to the scene of a shooting on November 10, 1998 (M.Tr.15) and while there he interviewed various witnesses, including Donald "Uncle Mo" Smith (M.Tr.16) who had witnessed the shooting and identified Hawkins as the shooter (M.Tr. 18). Stone learned that Hawkins lived in the trailer next door to Uncle Mo (M.Tr. 19). He also obtained some information from Cindy Dowell and Sharon Kendrick, who was not a witness (M.Tr. 20). Stone asked Sheriff Tawney to obtain a search warrant (M.Tr. 20). Stone assisted in the execution of the warrant that was obtained (M.Tr. 21). The search occurred at 7:30 a.m. on the morning after the shooting (M.Tr. 22). The door to Hawkins' trailer was unlocked (M.Tr. 22). Stone had knocked on the trailer door at approximately 1:00 a.m. the night before but no one answered (M.Tr. 23). The trailer was left unguarded prior to the search (M.Tr. 27).

Monroe County Sheriff Gary Tawney was called out to an assault in Monroe City after 1:00 a.m. on November 10th (M.Tr.29). He did not go to the shooting scene, but instead went to the Monroe City Police station and talked with

[4]The transcript of the Motion to Suppress is found in a Supplement Legal File and will be cited as M.Tr.

Rick Stone (M.Tr. 30). Tawney prepared an affidavit (State's Exh. 1)[5]. Based on that affidavit, a search warrant was obtained (State's Exh. 2) (M.Tr. 32). Tawney received all of the information he included in the affidavit from Rick Stone (M.Tr. 37).

During the search of Hawkins' trailer the police found a sonogram belonging to Marshal White (M.Tr. 54). Based on that, Sgt. Mike Platte, Trooper Hall, and Shelbina Police Chief Paul Bowen went to White's home where they arrested Hawkins after finding him hiding (M.Tr. 56). Hawkins was questioned at the residence (M.Tr. 57) and again at the police station (M.Tr. 58), where he wrote a statement (M.Tr. 60) which was read to the jury during trial (Tr. 342).

The trial court found the following:

> Of course in terms of what the judge reviewed, this says - - all it says is 'Affiant has obtained information.' It doesn't - - so from what Judge Blackwell would have been reviewing, he would have had no way to know from the affidavit where that information had come from, whether - - whether it was the sheriff got the information or whether he got it from an officer who got the information or whether it was five levels removed. I don't think

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[5]State's exhibits 1 and 2 have been supplied to this Court for its review and a copy of exhibit 1 is attached to this brief as Appendix A. The State did not introduce an Application for Search Warrant at the hearing.

that the affidavit itself - - doesn't set that out.

It seems to me it would have been rather simple and would have been certainly possible to have put together affidavits from Rick Stone and/or the other witness, but they're here today and they have testified. They were there that day.

(M.Tr. 49). Despite these observations, the trial court overruled the motions (L.F. 5) and permitted evidence obtained during, or resulting from, the search to be introduced during trial (Tr. 306, 308, 336, 342, Tr.Vol.2 - 289, 292).

ISSUES:

The issues presented are the sufficiency of Tawney's affidavit for a search warrant, whether law enforcement seized items during the search which they were not authorized to seize, and the applicability of the good-faith exception to the exclusionary rule.

STANDARD OF REVIEW:

In reviewing a motion to suppress based upon an insufficient warrant, the appellate court gives great deference to the initial judicial determination of probable cause made at the time of the issuance of the warrant, and reverses only if that determination is clearly erroneous. *State v. Berry*, 801 S.W.2d 64, 66 (Mo. banc 1990).

In reviewing whether the issuing judge was clearly erroneous, the appellate court looks to the four corners of the affidavit in support of the search warrant. *State v. Laws*, 801 S.W.2d 68, 70 (Mo. banc 1990).

TAWNEY'S AFFIDAVIT

While this Court must give the issuing judge's initial determination "great deference", he does not have unbridled discretion. As this Court noted in *State v. Hammett*, 784 S.W.2d 293 (Mo. App., E.D. 1989), "*Gates*[6] states that '[a]n affidavit must provide the [issuing judge] with a *substantial* basis for determining the existence of probable cause'". *Hammett*, 784 S.W.2d at 293, *quoting Gates*, 462 U.S. at 239. That substantial basis must include the "veracity" and "basis of knowledge" of persons supplying hearsay information. *Hammett, supra.* In addition, that substantial basis must exist *before* the search warrant is issued, and not afterwards with the benefit of 20-20 hindsight. *Hammett, supra.* And finally, it must be contained within the application and/or supporting affidavits since the issuing judge may not consider oral testimony in determining whether there is probable cause to issue the search warrant. *State v. Gordon*, 851 S.W.2d 607, 612 (Mo. App., S.D. 1993); § 542.276.3.

The issuing judge cannot simply ratify the bare conclusions of others. "In order to ensure that such an abdication of the [judge's] duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued." *Hammett, supra, quoting Gates*, 462 U.S. at 239. A

conscientious review of the affidavit in this case, apparently the only document provided to the court in support of the warrant, mandates a finding that it was wholly inadequate to establish probable cause.

This affidavit might generously be described as "bare bones". It contains no information about the source of Tawney's information, nor does it give any basis upon which any conclusions concerning the "veracity" or the "basis of knowledge" of the sources of information can be made. In fact, no one providing information is even identified except as "eyewitnesses" or "a witness". Tawney does not, because he cannot, claim to have gotten this information directly from the unidentified "eyewitnesses" and so he cannot provide any basis for crediting their information. Tawney received his information from Rick Stone who received his information from people at the scene. "[A]n affidavit relying on hearsay 'is not to be deemed insufficient on that score, so long as a substantial basis for crediting the hearsay is presented.'". *Hammett*, supra at 296, quoting *Gates*, 462 U.S. at 242-243. In this case there is no basis for crediting the hearsay.

There is also no basis from which the issuing judge could have found probable cause that any evidence of the crime would be found in Hawkins' trailer. The affidavit simply states that Hawkins lived "next to the scene of the shooting". A witness saw him flee the scene, and "[i]t is reasonable that he ran back into his residence" (Exh. 1). There is no information that anyone saw Hawkins enter his trailer after the shooting. There is no information in the affidavit that anyone

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[6] *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

heard noises from inside Hawkins' trailer or had any other basis to believe he was there. What the affidavit contains are Tawney's conclusions about what would be "reasonable". These conclusions have no basis in fact. That is not sufficient to support a finding that probable cause exists.

SEIZURE OF THE RAP LYRICS

Even if this Court determines that the affidavit was sufficient to support issuance of the search warrant, the seizure of two notes containing rap lyrics, taken from the refrigerator door in Hawkins' trailer during the search was illegal.

The warrant authorized seizure of the following: "Spent and unspent ammunition and a hand gun, as well as clothing containing blood spattering, and paperwork and maps indicating travel plans or an escape route and destination" (Exh. 2).

The inventory and receipt for property seized indicates that the police took "2 notes/letters stuck to refrigerator - kitchen" (Exhibit 2, Attachment 1). Those notes were introduced into evidence during trial and read to the jury (Exhibits 28 and 29)[7].

The law requires that search warrants contain specific descriptions of items subject to seizure. U.S. Const. amend. IV; Mo. Const. art. I, §15; § 542.276.2(3). That is to "prevent a general search and to ensure that the property taken will not be left to the caprice of the officer conducting the search. *State v*. *Brown*, 708

[7]Exhibits 28 and 29 have been supplied to this Court for its review.

S.W.2d 140, 143 (Mo. banc 1986). An examination of the notes taken from Hawkins' trailer show that they could not be described or seen by any reasonable person as "paperwork indicating travel plans or an escape route/destination". That evidence should have been suppressed. *State v. Gordon*, 851 S.W.2d at 616.[8]

The fact that these lyrics were in "plain view" does not make their seizure lawful. In order to justify the seizure of property pursuant to the "plain view" exception, the incriminating character of the property must be obvious. *State v. Johnston*, 957 S.W.2d 734, 743 (Mo. banc 1997), *citing Horton v. California*, 496 U.S. 128, 136-137, 110 S.Ct. 2301, 2307-2308, 110 L.Ed.2d 112 (1990). The only connection between the rap lyrics and the shooting was the fact that they were displayed in plain view on Hawkins' refrigerator. "[P]lain view **alone** is never enough to justify the warrantless seizure of evidence." *See, Coolidge v. New Hampshire*, 403 U.S. 443, 468, 91 S.Ct. 2022, 2039, 29 L.Ed.2d 564 (1971)(emphasis in original).

THE "GOOD FAITH" EXCEPTION

The "good faith" exception to the exclusionary rule cannot save this search and seizure. As the Supreme Court in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) pointed out, suppression remains appropriate in

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[8]Even if this Court finds that the rap lyrics were within the purview of the warrant, their admission at trial was error since they were irrelevant, see Point and Argument III, infra.

the situation where the warrant is based on affidavits "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable" *Id*. at 923. See also *State v*. *Hammett, supra* at 297. The affidavit written by Sheriff Tawney is so inadequate that no law enforcement officer could have, in good faith, believed it was constitutionally adequate to support the search warrant in this case.

FRUIT OF THE POISONOUS TREE

Because there was no basis for a finding of probable cause in the affidavit supplied to the issuing judge, the search of Hawkins' trailer was unconstitutional. Evidence found during that search, the sonogram belonging to Marshal White, led the police to White's home and to the arrest of Hawkins (M.Tr. 54-56). Because the search was unconstitutional, the statements Hawkins made to Sgt. Platte at the White residence and at the police station must be suppressed as the fruits of the poisonous tree. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

In *State v. Miller*, 894 S.W.2d 649, 654-657 (Mo. banc 1995), this Court discussed the "Attenuation Doctrine" while deciding whether evidence obtained after a Fourth Amendment violation would be suppressed. The Court adopted the three factors used in *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975). Those are: 1) the temporal proximity of the illegality and the confession; 2) the presence of intervening circumstances; and 3) the purpose and flagrancy of the official misconduct. *State v. Miller, supra* at 655. In *Miller*, the

Court found no attenuation even though a consent to search had been obtained between the time of the illegal seizure and the statements sought to be suppressed, and despite the Court's finding of no police misconduct. *Id.* at 656. This case is similar to *Miller.* Here, the police went to White's home immediately after locating the sonogram during the illegal search. Once there, Hawkins was arrested, questioned, and taken to jail where he was again questioned. Thus, the temporal distance between the illegal search and his statements is very close. In addition, the State presented no evidence of any intervening circumstances which might have dissipated the taint. The fact that Hawkins was given the *Miranda*[9] warnings is not a sufficient intervening circumstance to legitimate admission of his statements. As the Court in *Miller* noted, while the giving of *Miranda* warnings is relevant, it does not, as an intervening circumstance, create a sufficient filter between the illegality and the statements. *Id.* at 657, citing *Taylor v. Alabama,* 457 U.S. 687, 691, 102 S.Ct. 2664, 2667, 73 L.Ed.2d 314 (1982) (confession obtained six hours after illegal arrest and after defendant given *Miranda* warnings three times was not sufficiently attenuated from the original taint to permit its admission).

CONCLUSION

The trial court was clearly erroneous is overruling Hawkins' motions to suppress and in permitting the State to introduce the evidence obtained during the search in at trial.

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[9]*Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Introduction of the spent shell casings, rap lyrics and Hawkins' statements, oral and written, was prejudicial. Officer Platte's testimony that Hawkins told him the gun was left in the northwest corner of his trailer and that he had to retrieve it before shooting Cooper was particularly prejudicial. Hawkins denied making that statement (Tr. Vol. 2 – 199) and it is not contained in Hawkins' written statement. Even though Platte conceded on cross examination that he had never testified about this statements in prior hearings and that his notes of the interview had been destroyed (Tr. 348), if the jury believed his trial testimony, it destroyed Hawkins' defense of self-defense. The prejudicial effect of the rap lyrics is discussed in Point and Argument III. It cannot be said that the outcome of this trial would have been the same if that illegally seized evidence had not been introduced. Therefore, this Court should reverse Hawkins' convictions and remand for a new trial.

CONCLUSION

For all of the reasons stated in Points Relied On and Argument I, II, III, and IV, Nathan Hawkins respectfully requests that this Court reverse his convictions and remand this case for a new trial.

Respectfully Submitted,

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Certificate of Compliance and Service

I, Nancy A. McKerrow, hereby certify as follows:

- ✓ The attached brief complies with the limitations contained in this Court's Special Rule 1(b). The brief was completed using Microsoft Word, Office2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 11,790 words, which does not exceed the 31,000 words allowed for an appellant's brief.
- ✓ The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in July, 2001. According to that program, the disks provided to this Court and to the Attorney General are virus-free.
- ✓ A true and correct copy of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this ____ day of July, 2001, to John M. Morris, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

_____

Nancy A. McKerrow

CERTIFICATE OF SERVICE

I. Nancy A. McKerrow, hereby certify that on this ____day of July, 2001, two true and correct copies of the foregoing were mailed postage prepaid to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

_____
Nancy A. McKerrow

APPENDIX